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No. 84-1630

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BLUE CROSS HOSPITAL SERVICE, INC. OF MISSOURI, MISSOURI MEDICAL SERVICE; and BLUE CROSS AND BLUE SHIELD OF KANSAS CITY,
Appellants,

vs.

J. H. FRAPPIER, Director of the Department of Consumer Affairs, Regulation and Licensing, State of Missouri; C. DONALD AINSWORTH, Director of the Division of Insurance, State of Missouri; THE MISSOURI PSYCHOLOGICAL ASSOCIATION; MISSOURI PHARMACEUTICAL ASSOCIATION, INC.; and M. EARL CASH,
Appellees,

Appeal from The Supreme Court of the State of Missouri

APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

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Appellees,

Appeal from The Supreme Court of the State of Missouri

APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

Appellees*, pursuant to Rule 16, move to dismiss the appeal or to affirm the decision of the Missouri Supreme Court in this case, reported in 681 S.W.2d 925 (Mo. banc 1984).

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* In accordance with Rule 28.1, Appellees Missouri Psychological Association and Missouri Pharmaceutical Association, Inc. state that they are non-stock, not-for-profit membership corporations and have no subsidiaries or affiliates. The Associations are composed of individual members who are licensed psychologists and pharmacists, respectively, in the State of Missouri. M. Earl Cash is an individual chiropractor and J.H. Frappier and C. Donald Ainsworth are duly appointed officials of the State of Missouri.

A. The Questions Presented By Appellants Are Inaccurately Stated And Offer Insufficient Basis For Review By This Court.

Question I. Appellants wrongly pose Question I because the state freedom-of-choice laws at issue require Appellants Blue Cross and Blue Shield companies (hereinafter "Blues") to pay for services of particular providers *only if* the Blues' policies authorize payment for the same services when rendered by other providers. The main Missouri law attacked, § 354.027 RSMo Supp. 1984, states:

> A health services corporation which provides its members or beneficiaries with coverage for certain services, or reimbursement therefor, shall provide such coverage or reimbursement in all situations in which the covered service is performed by a person duly licensed to perform such service. No health service corporation may discriminate in its coverage or reimbursement amounts for covered services among persons duly licensed to provide such covered services.

The allied statute challenged, § 375.936(11)(b) RSMo Supp. 1984, makes it an unfair act to deny an insured full freedom of choice in the selection of any duly licensed physician, surgeon, optometrist, chiropractor, dentist, psychologist, pharmacist, pharmacy, or podiatrist.[1] Appellants' Question I inaccurately

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[1] In an opinion issued after the filing of the Jurisdictional Statement in this case, the Missouri Court of Appeals held that § 375.936(11)(b) means that "the health services corporation may not refuse reimbursement for treatment of covered illness or injury merely because the health care provider was a chiropractor. To do so is unfair discrimination prohibited by statute." *Klinginsmith v. Missouri Dept. of C.A.R.L.*, ___ S.W.2d ___ (Mo. App. W.D., May 14, 1985, W.D. 36038) (slip op. at 10) (opinion not final until all post-handdown motions have been disposed of and the mandate issued and received). Appellant Missouri Medical Service was a party-respondent in the *Klinginsmith* case.

claims that, if the Blues' policies "do not authorize payment for the *services* of the specified providers," the "state laws . . . require Blue Cross and Blue Shield companies to pay for *services*" of the specified providers. (emphasis added). This assertion is not true. The Blues wish to discriminate among providers, and limit subscribers' freedom to choose providers, without altering the services covered by the Blues' policies.

Question II. Appellants' Question II assumes that the Blues' prohibition on assignment is lawful under state law. In fact, the Missouri law attacked, § 354.090.2 RSMo Supp. 1984, expressly invalidates the Blues' anti-assignment policy. The enforcement of contracts (by assignment) is a matter of state control, just as is the enforcement of judgments (by garnishment). This Court has indicated that state garnishment of pension income is not preempted by ERISA. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, ____ n. 21, 103 S.Ct. 2890, 2901 n. 21 (1983). Likewise, state law governing assignment of contracts poses no issue of ERISA preemption.

B. The Statement Of Facts Presented By Appellants Ignores Essential Facts Which Demonstrate That This Court's Review Is Not Necessary.

Appellant Blues do not err in describing the history of the case or in quoting the statutes at issue. The Blues do violate their agreement in this litigation, that the issue of additional costs is irrelevant and will not be relied on, at trial or on appeal, as regards psychologists. (See App. C). The Blues' claim that the laws challenged "substantially increase the benefit and administration costs of the plans" (Jurisdictional Statement, p. 4) rings hollow in view of the agreement under which the case was tried.

The Blues also do not make clear that they offer their policies to individuals, to groups, to employee benefit plans exempt from ERISA regulation (*e.g.* church or government plans), and to employee benefit plans subject to ERISA. This explains the

Blues' inability at trial or on appeal (Jurisdictional Statement, p. 8) to specify the percentage of their policies sold to employee benefit plans as one part of an employee benefit plan. No employee benefit plans and no Blues' policies were introduced into evidence at trial. The statutes challenged, as held by the Missouri Supreme Court, do not affect self-funded employee benefit plans and are not intended to regulate employee benefit plans. 681 S.W.2d at 932.

This Court's full review is not necessary because the essential facts just outlined demonstrate this is not an appropriate case to resolve any questions regarding ERISA and the Blues' policies.

C. The Questions Posed By Appellants Are Not Substantial.

Appellant Blues assert that their proposed questions are "similar to" the issues in two cases under submission in this Court. *Metropolitan Life Insurance Co. v. Massachusetts,* and *Travelers Insurance Co. v. Massachusetts,* (Nos. 84-325 and 84-356). This assertion is not true. As the Blues admit (Jurisdictional Statement, p. 6), the Massachusetts statute mandates benefits, requiring insurers to provide coverage for specific medical conditions, such as mental illness. The Blues attempt to analogize the present case by labeling the Missouri statute at issue a "mandated provider" law. This label is misleading. In fact, the Missouri statute (and those of 49 other states) do not mandate which provider the Blues must pay, and do not specify the content of the Blues' policies. The statutes here attacked by the Blues state that *if* certain medical services are covered by the Blues' policy, then the Blues must pay any provider *which* the state licenses to provide the services and *which* the insured chooses. As the Blues realize (*ibid.*), these statutes prevent the Blues from restricting payment to one class of provider, specifically to physicians who hold the M.D. degree (and in some states the D.O. degree). The statutes challenged are more accurately labeled "freedom-of-choice" laws or "non-

discrimination" statutes, as the states have titled them. (See Appendix A). These statutes represent industry-specific pro-competition, little-antitrust laws.

No doubt, the questions posed appear substantial to the Blues. The Blues' Plans are "combinations of physicians, operating under the direction and control of their physician members." *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 469 n. 4 (1982); *cf. Arizona v. Maricopa County Med. Soc'y,* 457 U.S. 332, 352 n. 26 (1982). Beyond the views of the physician-controlled Blues, this Court requires that the questions presented be "so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution." Rule 15.1(h). The questions posed are not so substantial.

This Court has held that the Blues' restriction of payments to physicians (as opposed to psychologists) states a cause of action under the Clayton Anti-trust Act. *Blue Shield of Virginia v. McCready, supra* at 485. Because the Blues' restriction is potentially illegal, its vindication cannot justify a substantial question which requires this Court's attention. The Blues claim two federal policies are at issue—ERISA preemption and the McCarran-Ferguson policy of leaving insurance regulation to the states. (Jurisdictional Statement, p. 7). The Blues ignore the supervening federal policy of prohibiting restraints on competition such as they request this Court to reinstate by voiding the freedom-of-choice laws.

Paralleling the recognition of the benefits of health care competition by Congress and this Court, all 50 states[2] have some version of the statute here attacked. The statutes typically provide that consumers shall have full freedom of choice among, and that the Blues may not discriminate against, any duly licens-

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[2] Though the Blues reference "at least" 48 states with 125 statutes, all 50 states have freedom-of-choice statutes. See Appendix A.

ed health care provider for services legally performed within the scope of his or her license, when the services are covered by the Blues' policy. Many statutes state explicitly that they require that no particular benefits be offered[3] but only that there be no discrimination by class of provider by the Blues. There is a national consensus against the Blues' restrictions and for health care competition.[4]

Even more significantly, this national consensus was in place before January 1, 1975, the effective date of ERISA's preemption clause. 29 U.S.C. § 1144(a). As Appendix A demonstrates, 43 of the 50 states had a freedom-of-choice statute before January 1, 1975.[5] The Blues ask this Court to invalidate present statutes in all 50 states when the 93rd Congress which adopted ERISA must be presumed to know the law in 43 of the 50 states. It stretches credulity that the 93rd Congress would have voted so overwhelmingly for ERISA (407-2, 85-0) if it repealed consumers' freedom of choice among licensed health professionals in 43 states. 120 *Cong. Rec.* 29215, 29963 (1974).

The Blues' main thrust is that the freedom-of-choice statutes impose a "crazy-quilt patchwork of local requirements . . . ." (Jurisdictional Statement, p. 7). This "-patchwork" results

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[3] *See, e.g.*, Ala. Code §27-1-18(c); Me. Rev. Stat. Ann 24-A § 2744.2; Mich. Comp. Laws Ann. § 500.3475. State courts in other states have held that freedom of choice laws do not require that particular benefits be offered. *Schrumpf v. Georgia Int'l Life Ins. Co.*, 413 So. 2d 267, 269 (La. Ct. App. 1982).

[4] It is most interesting that one of the Blues' main authority arises from the New York law which requires reimbursement of chiropractors if covered treatments are within the scope of their license. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 122 (1982).

[5] The seven states without freedom-of-choice statutes on January 1, 1975, were Alaska, Connecticut, Georgia, Iowa, Maine, North Dakota and Texas. See Appendix A. Each of these states has adopted freedom-of-choice laws since January 1, 1975.

from the facts that different states license different professionals, and that different states protect different professionals from the Blues' restrictions on professionals. The Blues' prime example, practitioners of Oriental Medicine in Nevada, is instructive because (1) Nevada has full regulation of practitioners of Oriental Medicine, including a State Board, licensing, examination, educational requirements, approved schools, and penalties for unauthorized practice, chapter 634A Nev. Rev. Stat.' and, (2) the Blues do not even assert that their plans reimburse for acupuncture and herbal medicine, which are the only areas of practice authorized for Oriental Medicine practitioners and the only procedures for which they would be on equal footing with the Blues' favored physicians. The Blues desire to use ERISA in order to permit them, not the state and not the subscriber, to determine who may render what type of medical services. Since the founding of the Republic, the licensing and regulation of professionals has been left exclusively to the States within their respective jurisdictions. *Leis v. Flynt*, 439 U.S. 438, 442 (1979). There is no indication in the legislative history of ERISA that Congress intended ERISA to displace state regulation of professionals and to enforce the anti-competitive restrictions of the Blues.

The Blues also contend that the questions are substantial because they have many subscribers who work for many employers. Rather than demonstrating that the questions are substantial, the quantitative measure demonstrates that the Blues have had no difficulty living with freedom-of-choice statutes. After all, California has had a freedom-of-choice statute since 1959, for 26 years. Cal. Ins. Code (West) § 10176. New York, between 1962 and 1971, enacted and expanded its freedom-of-choice statute to include podiatrists, optometrists, dentists, psychologists, and chiropractors. N.Y. Ins. Law (McKinney) § 221 (now codified at § 4235(f)(4)). There is no evidence in this record that the Blues have disobeyed the laws of all 50 states for over 20 years. As for the Blues' concern for commercial life and health insurers, the evidence is this case

consists of the testimony of a representative of one commercial insurer who stated that his company offers full freedom of choice regardless of the state's statute. (R. 180, l's. 2-20).

The questions posed by the Blues are not substantial because they are not similar to those in two cases under submission in this Court; because they seek this Court's imprimateur to void freedom-of-choice, anti-discrimination laws in all 50 states; because a national consensus against the Blues' desired restrictions existed before ERISA became law; because the challenged laws reflect the states' exclusive control of licensing and regulation of professionals; and because freedom-of-choice laws have existed for over 20 years.

D. The Challenged Statutes Are Not Preempted By ERISA Because They Do Not "Relate To" Employee Benefit Plans.

The Blues attack the Missouri Supreme Court for a "narrow interpretation" of when a state statute "relates to" an employee benefit plan. (Jurisdictional Statement, p. 8). The holding of the Missouri Supreme Court is:

> We are not convinced, in any event, that aside from the insurance exemption, the challenged legislation is preempted by ERISA. ERISA preempts any state law relating to employee benefit plans. *Shaw v. Delta Airlines, Inc.*, 463 U.S. ____, 103 S.Ct. 2890, 77 L.Ed2d 490 (1983). The statute in question does not relate to employee benefit plans. It prohibits health service corporations from engaging in certain discriminatory practices. Nothing is required of an employee benefit plan. The plan may provide, or not provide, any bargained for service. A self-insured plan is free to discriminate among providers. Commercial insurers, however, may not discriminate among licensed providers.

681 S.W.2d at 931-32. By its very citation, the Missouri Supreme Court did not ignore the teachings of this Court in

Shaw v. Delta Airlines, Inc., supra. In *Shaw,* this Court stated, "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner as to warrant a finding that the law 'relates to' the plan," referencing a Second Circuit case holding that state garnishment of pension income is not preempted by ERISA. *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, ____ n. 21, 103 S.Ct. 2890, 2901 n. 21 (1983). Similarly, in this case, the Missouri Supreme Court relied on its previous decision that the state garnishment law is not preempted by ERISA. *Electrical Wrks Local No. 1 v. IBEW-NECA Holiday Trust Fund,* 583 S.W.2d 154, 159 (Mo. banc 1979). Question II, as posed by the Blues, concerns a state's control of assignments of contracts. The subject of enforcement of contracts is a matter of prime state concern, just as is the enforcement of judgments by garnishment. In labor law, this Court has recognized that "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility . . . in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act." *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 244 (1959). The control of garnishment, assignment, and professional licensing are matters "so deeply rooted in local feelings and responsibility" that preemption is not appropriate.

The purpose of the statutes at issue is not to regulate employee benefit plans. In the definitional section of the ERISA preemption provision, Congress requires that a state law, in order to be preempted, must "*purport* to regulate, directly or indirectly, the terms and conditions of employee benefit plans. . ." 29 U.S.C. § 1144(c)(2) (emphasis added). The freedom-of-choice laws do not intend to regulate employee benefit plans. They regulate all health insurance policies, whether issued to an individual, a group, an exempt employee plan, or an ERISA-regulated employee plan. The Blues claim that such intent to regulate employee plans is demonstrated by one Missouri statute's postponement of the effective date for

group contracts. (Jurisdictional Statement, p. 11). This transition clause proves the opposite because, unlike the mandated benefits statute in the Massachusetts case, *Attorney General v. Travelers Ins. Co.*, 463 N.E.2d 548, 549 n. 2, 551 (Mass. 1984), the Missouri statute does not reference "employees' health and welfare funds," or employee benefit plans in any way.

The Blues also argue that the freedom-of-choice statutes "relate to" employee benefit plans because the Blues believe that the statutes increase the cost of such plans. The Second Circuit Court of Appeals has made an appropriate response to this argument:

> In short, if ERISA is held to invalidate every State action that may increase the cost of operating employee benefit plans, those plans will be permitted a charmed existence that never was contemplated by Congress. Where, as here, a State statute of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated.

Rebaldo v. Cuomo, 749 F.2d 133, 138-39 (2d Cir. 1984). *See also Lane v. Goren*, 743 F.2d 1337, 1340 (9th Cir. 1984); *American Progressive Life & Health Ins. Co. v. Corcoran*, 715 F.2d 784, 787 (2nd Cir. 1983) (regulation of commissions of life insurance agents on sales to employee plans, not preempted). However much the physician-controlled Blues may dislike the analogy, the freedom-of-choice statutes are analogous to State labor laws that govern working conditions and labor costs. *Rebaldo v. Cuomo, supra* at 138. The states, all 50 of them, have legislated professional labor laws requiring non-discrimination among medical professionals and freedom-of-choice for the Blues' subscribers. Congress did not intend ERISA to preempt the widespread state professional labor laws.

Second, the Blues have agreed in this litigation that the issue of additional costs is irrelevant and will not be relied upon, at

trial or on appeal, as regards psychologists. (See Appendix C.) To the extent that the Blues' discussion of costs references psychologists, it violates the agreement under which the case was tried and is irrelevant. Further, the Blues' agreement that freedom of choice of psychologists is irrelevant to the issue of costs makes suspect their assertion about increased costs in general.

Third, the competition fostered by the challenged statutes results in lower costs, rather than higher costs, to the whole health care system. (See, e.g., articles cited in Appendix B.) The Blues suffer from the fallacy of composition seeing only the costs and benefits to themselves and their favored physicians, rather than to their subscribers and the whole economy.

The bottom-line complaint of the Blues is clear: freedom-of-choice laws "interfere with the discretion" of employee benefit plan designers to set all aspects of plans, free from state control. (Jurisdictional Statement, p. 13). Because the subscriber chooses the provider, the subscriber does not pay for services he or she does not want. Rather, the only offended party is the Blues who have seized (albeit a decade late) ERISA in order to try to reinstate discrimination outlawed by the states over the last 26 years.

E. The Challenged Statutes Are Excepted From ERISA Preemption As "Regulation Of Insurance."

The Missouri Supreme Court held that the challenged statutes regulate insurance and are excepted from ERISA preemption because they are "any law of any state which regulates insurance." 681 S.W.2d at 931, quoting 29 U.S.C. § 1144(b)(2)(A). The Missouri Supreme Court's holding is well founded because the evidence in this case demonstrates that the Blues are in the insurance business. The St. Louis Blues use a professional actuarial consulting firm. (Tr. 114, l's. 14-15). The Kansas City Blues have an actuary on their staff. (Tr. 115, l. 3). The Blues' sales representatives receive incentives for the

number of people brought under their policies. (Tr. 115, l's. 9-11, 15-18, 22). Premiums are established by the Blues' actuarial division. (Tr. 120, l. 20). The Blues authorize licensed insurance agents to submit proposals for health insurance on their behalf to individuals, groups and employers. (Tr. 141, l's. 1, 6, 13). The Blues then pay the insurance agency a standard insurance industry commission. (Tr. 141, l's. 20, 24-25). The Chief Actuary for the Kansas City Blues, in fact, testified that his experience with health *insurance* is to set rates. (Tr. 145, l's. 5-6, 12). The Chief Actuary stated the basis for his rate determinations. (Tr. 146, l's. 9-22). The evidence before this Court demonstrates that the Blues are in the insurance business, as found by the Missouri Supreme Court. 681 S.W.2d at 931.

The Blues hope to ignore the facts in this case and to transpose the limited definition of "business of insurance" in the McCarran-Ferguson Act, 15 U.S.C. § 1812(b), into ERISA's exception from preemption. The definition of "business of insurance" in the McCarran-Ferguson Act is an exemption from the antitrust laws and is to be narrowly construed. *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). The Blues propose to limit the exception to ERISA's preemption just as this Court has limited the exception from the antitrust law.

The Blues accuse the Missouri Supreme Court of "confusing the regulation of insurance companies with the regulation of insurance." (Jurisdictional Statement, p. 13). The lower court is not in error because the ERISA preemption statute itself refers to state laws which "regulate insurance companies, insurance contracts . . ." in defining the limit of preemption. 29 U.S.C. § 1144(b)(2)(B). "Insurance" for purpose of the preemption of ERISA is not coextensive with "insurance" for the purpose of the exception to the antitrust laws.

The Blues' position misses the supervening policy of encouraging competition and prohibiting anti-competitive

measures. The antitrust laws foster competition, which explains why the McCarran-Ferguson insurance exemption must be narrowly construed. *Group Life & Health Ins. v. Royal Drug Co., supra* at 231. The challenged statutes in this case encourage competition, which explains why the McCarran-Ferguson "insurance" definition must not be used to defeat its very purpose of fostering competition.

There is a further sleight-of-hand in the Blues' argument. The Blues rely heavily on antitrust cases in order to show that agreements between the Blues and providers (pharmacists and chiropractors) are not "insurance." (Jurisdictional Statement, pp. 14-16). Yet, in this case, the reason for the challenged statutes is that the Blues will *not* enter a provider agreement with certain providers. Because there are no provider agreements, the characterization of actual provider agreements is irrelevant. In this case, the state cannot be regulating provider agreements. The state must be regulating the contracts offered by the Blues to subscribers. This Court made clear in the *Royal Drug* case that the Blues' subscriber policies may be "insurance" even within the meaning of the McCarran-Ferguson Act. *Group Life and Health Ins. v. Royal Drug Co., supra* at 320 n. 7. The Missouri Supreme Court likewise made the finding that the subscriber agreements of the Blues constitutes "insurance." 681 S.W.2d at 931.[6]

The straightforward approach is to begin with the language of ERISA, which states that ". . . nothing in this title [ERISA] shall be construed to exempt or relieve any person from any law

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[6] The Blues' alleged concern for provider agreements is an absolute smokescreen. The evidence in the record is that the Blues will reimburse a subscriber for the services of a provider within the favored class (a physician) even if the chosen physician does *not* have a provider agreement with the Blues. Tr. 105, l's. 16-21; Tr. 111, l's. 5-12; Tr. 140, l's. 6-12.

of any state which regulates insurance . . . ." 29 U.S.C. § 1144(b)(2)(A). Forty-eight of the 50 states have enacted a freedom-of-choice law as part of their insurance code.[7] The various state legislatures, controlled by different parties (with one non-partisan) and diverse in every regard, have agreed that the anti-discrimination statute is a law regulating insurance. Missouri, in fact, has adopted a specific statute so stating, § 375.947 RSMo Supp. 1984 (App. D), which the Missouri Supreme Court has approved as reasonable. 681 S.W.2d at 931. The legislative and judicial consensus is clear: feedom of choice is a law regulating insurance.

Though not explicitly so stating, the Blues may be expressing the concern that the states will use the insurance exception to subvert the general preemption of ERISA. This concern is not relevant in this case because at the time Congress enacted ERISA, 43 of the 50 states had some form of freedom-of-choice law. When congress referred to "any law of any state which regulates insurance," it referred to the freedom-of-choice laws which were prevalent in the state insurance codes.

The Blues advance a three-part test, based on the McCarran-Ferguson cases, to determine what is "insurance." This three-part test would completely negate the insurance exception from ERISA preemption. For example, the third test is "whether the practice is limited to entities within the insurance industry." Any time insurance is part of an employee benefit plan, entities outside the insurance industry will participate, at a minimum Blues-approved providers and employers. Insurance in an employee benefit plan will thus necessarily not be "the business of insurance" for the purpose of McCarran-Ferguson, and

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[7] The Delaware and North Dakota laws cited in Appendix A are not in the insurance code, but appear in the occupations and professional codes of those two states.

ERISA will always preempt state insurance laws.[8] Congress did not intend ERISA to preempt state insurance laws as demonstrated (1) by the insurance exception to preemption, 29 U.S.C. § 1144(b)(2)(A) and (2) by the statement that an employee benefit plan may provide for participants "through the purchase of insurance or otherwise..." 29 U.S.C. § 1002(1). Unlike the Blues, Congress realized that the regulation of an insurance contract which is purchased by an employee benefit plan is not necessarily the regulation of an employee benefit plan.

The first and second parts of the Blues' proposed test ironically prove too much. If accurate, the first two tests would mean that the freedom-of-choice laws do not relate to the insurance which constitutes part of the plan. If the freedom to choose a provider has "nothing to do with the transfer and spreading of risk" and is "not an integral part of the insurance relation" (Jurisdictional Statement, pp. 16-17, 18), then the Blues must concede that the freedom-of-choice statutes have no relation to the insurance which is part of the employee benefit plan. If these statutes have no relation to the plan, then ERISA does not preempt them, by the clear terms of 29 U.S.C. § 1144(a). The Blues' strict definition of "insurance" (taken from the context of giving the antitrust laws full sway) destroys their argument that freedom-of-choice laws relate to employee benefit plans.

The challenged statutes are excepted from ERISA preemption because they constitute laws "which regulate insurance." The evidence is this case so demonstrates. The limited definition of "insurance" for the purpose of the McCarran-Ferguson Act should not be transposed into the ERISA context because the

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[8] As more employee benefit plans buy insurance, the state's control of insurance will drastically diminish under the Blues' view. *See Firms Offering 'Universal Life' In Benefit Plans, Wall St. J.*, May 9, 1985, p. 31, col. 3.

antitrust laws (which necessitate narrow construction of "insurance" as an exemption) have the same policy as the industry-specific antitrust laws at issue in this case. Previous cases holding provider agreements not to be insurance are irrelevant to this case because there are no such agreements here. The states, before and since the enactment of ERISA, have clearly stated that freedom of choice laws are "laws regulating insurance." There is no need for this Court to review the national consensus against the Blues' discrimination.

F. The Challenged Statutes Are Excepted From ERISA Preemption Because Their Preemption Would Alter, Amend, Modify, Invalidate, Impair Or Supersede The Antitrust Law Of The United States.

The state laws at issue in this case permit freedom of choice by the Blues' subscribers and foster competition among licensed providers. These state laws prohibit the Blues from restricting competition and restricting payments to one class of providers, physicians. Prohibition of the Blues' restrictions carries out the purpose of the federal antitrust laws. *Blue Shield of Virginia v. McCready, supra* at 485. The Blues request this Court to reverse its *McCready* decision and void state laws which prohibit a group boycott found actionable by *McCready*.

ERISA preemption shall not "be construed to alter, amend, modify, invalidate, or supersede any law of the United States." 29 U.S.C. § 1144(d). If this Court were to void the state freedom-of-choice laws, it would impair the federal antitrust laws. This parallels the decision of this Court that state fair employment laws are so important to the federal Title VII statute that the state laws are not preempted by ERISA. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, ____, 103 S.Ct. 2890, 2902 (1983). As an expression of federal opposition to anti-competitive measures such as the Blues' preference for M.D.'s (and D.O.'s), the state freedom-of-choice laws should be excepted from ERISA preemption.

CONCLUSION

It would be anomalous to find that although the Blues' restriction of competition by limiting providers states a cause of action under the antitrust laws, this same restriction is so substantial as to require plenary consideration of this case and serious resolution of the Blues' attempt to invalidate the laws of all 50 states, many of which were enacted before ERISA. For the reasons set out, Appellees request that this Court dismiss the appeal or affirm the decision of the Missouri Supreme Court.

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* This motion has been prepared by Duane Benton as Counsel for Missouri Pharmaceutical Association, Inc. It has been reviewed, approved and concurred in by Counsel of Record for all Appellees.

APPENDIX

APPENDIX A

STATE FREEDOM-OF-CHOICE AND ANTI-DISCRIMINATION LAWS WITH DATE OF ENACTMENT

Statutory Citation	Type of Provider[1]	Date of Enactment
Alabama (Ala. Code)		
§27-1-10	Chiropractor	1975
§27-1-11	Dentist	1975
§27-1-15	Podiatrist	1976
§27-1-18	Psychologist	1982
§27-1-18	Psychiatrist	1982
§27-19-39	Optometrist	1967
Alaska (Alaska Stat.)		
§21.42.355	Nurse-Midwife	1982
§21.89.040	Optometrist	1976
Arizona (Ariz. Rev. Stat. Ann.)		
§20-1406	Licensed Providers	1966
§20-1406	Optometrist	1968
§20-1406	Podiatrist	1966
§20-1406	Dentist	1966
§20-1406.01	Psychologist	1983
§20-1406.01	Chiropractor	1983
Arkansas (Ark. Stat. Ann.)		
§66-3212.2	Optometrist	1971
§66-3212.4	Podiatrist	1975
§66-3212.6	Psychologist	1975
§66-3212.8	Dentist	1981
§66-3212.12	Dentist	1981

[1] Other than physician and surgeon

California (Cal. Ins. Code (West))		
§10176	Psychologist	1969
§10176	Social Worker	1976
§10176	Licensed Counselor	1980
§10176	Speech Pathologist	1978
§10176	Audiologist	1978
§10176	Psychiatric-Mental Health Registered Nurse	1982
§10176	Chiropractor	1968
§10176	Dentist	1963
§10176	Podiatrist	1959
§10176	Optician	1965
§10176	Optometrist	1965
§10176	Occupational Therapist	1978
§10176	Accupuncturist	1984
§10176.2	Physical Therapist	1971
Colorado (Col. Rev. Stat.)		
§10-8-103	Osteopath	1969
§10-8-103	Dentist	1973
§10-8-103	Optometrist	1971
§10-8-103	Psychologist	1969
§10-8-103	Chiropractor	1973
§10-8-103	Podiatrist	1969
Connecticut (Conn. Gen. Stat. Ann. (West))		
§38-174d	Psychologist	1983
§38-174d	Psychiatrist	1983
§38-174d	Social Workers for Child Guidance Clinic	1979
§38-174h	Dentist	1975
§38-174q	Occupational Therapist	1982
§38-174v	Nurse midwife	1984
§38-174v	Nurse practitioner	1984
§38-174v	Psychiatric mental health clinical nurse specialist	1984
Delaware (Del. Code Ann.)		
24 § 511	Podiatrist	1961
24 § 717	Chiropractor	1963
24 § 2101	Optometrist	1963
Florida (Fla. Stat. Ann. (West))		
§627.419(2)	Dentist	1969
§627.419(3)	Optometrist	1972
§627.419(3)	Podiatrist	1974
§627.6406	Nurse-Midwife	1983

Georgia (Ga. Code)		
§33-24-27	Psychologist	1980
§33-24-27	Chiropractor	1980
§33-24-27.1	Optometrist	1981
Hawaii (Hawaii Rev. Stat.)		
§431-450	Optometrist	1967
§431-499	Dentist	1974
§431-500	Psychologist	1984
Idaho		
§41-2103(8)	Podiatrist	1965
§41-2103(9)	Optometrist	1967
Illinois (Ill. Ann. Stat. Ins. Code (Smith-Hurd))		
§364	Dentist	1969
§370b	Osteopath	1969
§370b	Chiropractor	1969
§370c	Psychologist	1977
Indiana (Ind. Code Ann. (Burns))		
§27-8-6-1	Dentist	1974
§27-8-6-1	Podiatrist	1974
§27-8-6-1	Osteopath	1969
§27-8-6-1	Optometrist	1969
§27-8-6-1	Chiropractor	1969
Iowa (Iowa Legis. Serv. (West))		
§509.3 & 514.7	Optometrist	1983
Kansas (Kan. Stat. Ann.)		
§40-2, 100	Optometrist	1973
§40-2, 100	Dentist	1973
§40-2, 100	Podiatrist	1973
§40-2, 104	Psychologist	1974
§40-2, 114	Licensed Clinical Social Worker	1982
Kentucky (Ky. Rev. Stat.)		
§304.18-095(1)	Optometrist	1972
§304.18-095(1)	Osteopath	1972
§304.18-097	Dentist	1976
Louisiana (La. Rev. Stat. Ann. (West))		
§22:213.1	Dentist	1974
§22:662	Podiatrist	1972
§22:664	Optometrist	1972
§22:665	Psychologist	1974
§22:668	Chiropractor	1975
§22:669	Social Worker	1982

Maine (Me. Rev. Stat. Ann.)		
24-A § 2744	Psychologist	1975
24-A § 2744	Social Worker	1984
24-A § 2744	Psychiatric Nurse	1984
Maryland (Md. Ann. Code Art. 48A)		
§477-AA	Any licensed provider	1984
§477-F	Optometrist	1974
§477-O	Social Worker	1977
§477T	Nurse-Practitioner	1979
§489	Chiropractor	1967
§490A	Psychologist	1972
§490	Podiatrist	1968
§490A-1	Dentist	1974
§490A-2	Nurse-Midwife	1979
Massachusetts (Mass. Gen. Laws. Ann. Ch. 175e (West))		
§108B	Dentist	1975
§108D	Chiropractor	1984
§110(F)	Optometrist	1966
§110(I)	Podiatrist	1975
Michigan (Mich. Comp. Laws Ann.)		
§500.2243	Optometrist	1965
§500.2239	Dentist	1982
§500.3475	Psychologist	1968
§500.3475	Chiropractor	1966
§500.3475	Podiatrist	1963
Minnesota (Minn. Stat. Ann. (West))		
§62A.15.3	Optometrist	1976
§62A.15.2	Chiropractor	1973
§62A.15.3a	Advanced Registered Nurse	1983
§62A.043	Dentist	1973
§62A.043	Podiatrist	1976
§62A.152.3	Psychologist	1983
Mississippi (Miss. Code Ann.)		
§83-41-203	Optometrist	1966
§83-41-209	Dentist	1974
§83-41-211	Psychologist	1974
§83-41-213	Nurse Practitioner	1980
§83-41-215	Chiropractor	1980

Missouri (Mo. Ann. Stat. (Vernon))		
§375.936(11)(b)	Optometrist	1971
§375.936(11)(b)	Chiropractor	1969
§375.936(11)(b)	Dentist	1976
§375.936(11)(b)	Psychologist	1983
§375.936(11)(b)	Pharmacist	1978
§375.936(11)(b)	Podiatrist	1976
§354.027	"Person duly licensed" to perform covered services	1983
§354.090-2	Pharmacist (assignment)	1983
Montana (Mont. Code Ann.)		
§33-22-111	Dentist	1981
§33-22-111	Osteopath	1967
§33-22-111	Chiropractor	1967
§33-22-111	Optometrist	1967
§33-22-111	Chiropodist	1967
§33-22-111	Psychologist	1971
§33-22-111	Nurse Specialist	1983
§33-22-111	Pharmacist	1967
Nebraska (Neb. Rev. Stat.)		
§44-513	Osteopath	1969
§44-513	Chiropractor	1969
§44-513	Optometrist	1967
§44-513	Psychologist	1974
§44-513	Dentist	1975
§44-513	Podiatrist	1969
Nevada (Nev. Rev. Stat.)		
§689A.135	Assignment to any provider	1983
§689A.380	Dentist	1971
§689A.380	Osteopath	1971
§689A.380	Chiropractor	1971
§689A.380	Oriental Medicine	1975
§689A.380	Podiatrist	1971
§689A.380	Optometrist	1971
§689A.048	Psychologist	1979
§689A.049	Chiropractor	1981
§689B.038	Psychologist	1981
§689B.039	Chiropractor	1981

New Hampshire (N.H. Rev. Stat. Ann.)		
§415-18(vi)	Osteopath	1969
§415-18(vi)	Chiropractor	1969
§415-18(vi)	Podiatrist	1969
§415-18(vi)	Optometrist	1969
§415-18(viii)	Dentist	1975
§415-18a	Licensed Pastoral Counselor	1979
§415-18a	Psychologist	1976
§415-18a	Psychiatrist	1976
§1983	Certified Clinical Social Worker	1983
New Jersey (N.J. Stat. Ann. (West))		
§17B:27-50	Psychologist	1968
§17B:27-51	Optometrist	1967
§17B:27-51.1	Chiropractor	1975
§17B:27-51.8	Dentist	1979
New Mexico (N.M. Stat. Ann.)		
§59A-22-32	Chiropractor	1963
§59A-22-32	Dentist	1963
§59A-22-32	Osteopath	1963
§59A-22-32	Optometrist	1965
§59A-22-32	Psychologist	1978
§59A-22-32	Podiatrist	1967
§59A-22-32	Nurse Midwife	1979
New York (N.Y. Ins. Law (McKinney))		
§3221(k)(5)	Nurse Midwife	1983
§4235(f)(4)(B)	Podiatrist	1962
§4235(f)(4)(C)	Optometrist	1962
§4235(f)(4)(D)	Dentist	1969
§4235(f)(4)(E)	Psychologist	1969
§4235(f)(4)(F)	Chiropractor	1971
§4235(f)(4)(A)	Physical Therapist	1963
North Carolina (N.C. Gen. Stat.)		
§58-260	Optometrist	1965
§58-260	Podiatrist	1967
§58-260	Dentist	1965
§58-260	Chiropractor	1969
§58-260	Psychologist	1977
North Dakota (N.D. Century Code)		
§43-13-31	Optometrist	1979

Ohio (Ohio Rev. Code Ann. (Baldwin))		
§3923.23	Osteopath	1969
§3923.23	Optometrist	1969
§3923.23	Chiropractor	1969
§3923.23	Podiatrist	1969
§3923.231	Psychologist	1973
§3923.232	Dentist	1973
§3923.233	Nurse Midwife	1984
Oklahoma (Okla. Stat. Titl. 36)		
§3634	Podiatrist	1963
§3634	Psychologist	1975
§3634	Social Worker	1982
§6051	Optometrist	1967
§6055	Any practitioner licensed under the healing arts	1971
Oregon (Or. Rev. Stat.)		
§743.117	Optometrist	1967
§743.123	Psychologist	1975
§743.128	Nurse Practitioner	1979
§743.132	Dentist	1980
§743.132	Denturist	1980
§743.135	Social Worker	1981
Pennsylvania (Pa. Stat. Ann. Tit. 40 (Purdon))		
§1502	Optometrist	1965
§1511	Osteopath	1971
§1511	Dentist	1971
§1511	Chiropractor	1971
§1511	Podiatrist	1971
§1511	Physical Therapist	1978
§3002	Nurse Midwife	1981
Rhode Island (R.I. Gen. Laws)		
§27-18-25	Chiropractor	1968
§27-18-25	Osteopath	1968
South Carolina (S.C. Code Ann.)		
§38-35-90	Podiatrist	1972
§38-35-90	Oral Surgeon	1980
South Dakota (S.D. Codified Laws Ann.)		
§58-17-53	Optometrist	1966
§58-17-54	Dentist	1970
§58-17-54	Osteopath	1970
§58-17-54	Chiropractor	1970
§58-17-54	Podiatrist	1970
§58-17-54	Physician Assistant	1980
§58-17-54	Nurse Practitioner	1980

Tennessee (Tenn. Code Ann.)		
§56-7-108	Optometrist	1965
§56-7-108	Psychologist	1974
§56-7-108	Podiatrist	1981
§56-7-116	Chiropractor	1981
§56-7-1002	Dentist	1974
Texas (Tex. Ins. Code Ann. (Vernon))		
§21.35A	Psychologist	1977
§21.52	Podiatrist	1977
§21-52	Dentist	1979
§21-52	Chiropractor	1979
§21-52	Optometrist	1979
§21-52	Audiologist	1983
§21-52	Speech-Language Pathologist	1983
Utah (Utah Code Ann.)		
§31-20-3	Optometrist	1965
§31-27-24	Dentist	1970
§31-27-24	Chiropodist	1970
§31-27-24	Chiropractor	1970
§31-27-24	Duly licensed practitioner of healing arts	1970
§31-27-24	Psychologist	1975
§31-27-24	Certified Social Worker	1975
Vermont		
§4585a	Optometrist	1971
Virginia (Va. Code)		
§38.1-347.1	Chiropractor	1968
§38.1-347.1	Optometrist	1973
§38.1-347.1	Optician	1973
§38.1-347.1	Psychologist	1973
§38.1-347.1	Social Worker	1979
§38.1-347.1	Podiatrist	1973
§38.1-347.1	Chiropodist	1973
§38.1-348.5	Dentist	1968
Washington (Wash. Rev. Code Ann.)		
§48.20.390	Podiatrist	1963
§48.20.410	Optometrist	1965
§48.20.411	Registered Nurse	1973
§48.20.412	Chiropractor	1971
§48.20.414	Psychologist	1971
§48.20.416	Dentist	1974

West Virginia (W. Va. Code)		
§33-6-30	Dentist	1965
§33-6-30	Podiatrist	1967
§33-6-30	Chiropractor	1973
§33-6-30	Optometrist	1967
§33-16-3e	Registered Nurse	1984
§33-16-3e	Nurse Midwife	1984
Wisconsin (Wis. Stat. Ann. (West))		
§628.33	Chiropractor	1974
§632.87	Optometrist	1982
Wyoming (Wyo. Stat.)		
§26-22-101	"Person licensed under laws of state to treat illness or disability or perform the health services"	1971

TOTALS

States: 50

APPENDIX B

Studies Of Economic Impact Of Freedom-Of-Choice Laws

Frank, *Pricing and Location of Physician Services in Mental Health* (Unpub. Ph.D. Dissentation, 1981).

Karon & Vandenbos, *Cost/Benefit Analysis: Psychologist Versus Psychiatrist for Schizophrenics, Prof. Psych.*, Feb. 1976, p. 107

McGuire, *Compulsory Insurance for Psychotherapy?, Clin. Psych.*, Summer 1981, p. 13.

Mumford, Schlesinger & Glass, *The Effects Of Psychological Intervention on Recovery From Surgery And Heart Attacks*, 72 *Am. J. Pub. Health* 141 (1982).

Schlesinger, Mumford, Glass, Patrick & Sharfstein, *Mental Health Treatment and Medical Care Utilization in a Fee-For-Service System*, 73 *Am. J. Pub. Health* 422 (1983).

APPENDIX C

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December 7, 1983

Mr. Daniel P. Card, II
Attorney at Law
7701 Forsyth - Suite 680
Pierre Laclede Building
Clayton, Missouri 63105

RE: Blue Cross et al. vs. Frappier, et al.
Cole County Circuit Court, Cause No.
CV 183-864CC

Dear Mr. Card:

On behalf of the three plaintiffs in the case of Blue Cross Hospital Service, Inc., et al. vs. J. H. Frappier, et al., pending in the Cole County Circuit Court, Cause No. CV 183-864CC, it is agreed that in the event that the Court should determine that Senate Substitute for Senate Committee Substitute for House Bill No. 127, enacted June 30, 1983 and approved by the Governor July 28, 1983, is unconstitutional in violation of Article III, Sections 21 or 23, or both, of the Constitution of Missouri, except as to Section 375.936, the plaintiffs will not contest the severability of Section 375.936, either in the Circuit Court or in the event of an appeal, in the Missouri Court of Appeals or in the Missouri Supreme Court. The foregoing agreement is without prejudice to any determination by the Court concerning the issue of severability of any part of said statute, including, but not limited to Section 375.936, with reference to any of the counts in plaintiffs' petition other than Counts I or II.

This agreement is conditioned upon the Missouri Psychological Association's agreement not to contest plaintiffs' standing to sue in the above action or the preliminary injunction order issued by the Court on November 23, 1983, and also the Missouri Psychological Association's waiving its right to discovery and to a further evidentiary hearing prior to the submission of this case to the Court on the merits.

It is agreed that the issue whether or not additional costs will be incurred by plaintiffs in paying for the services of psychologists only and the evidence introduced on that subject at the hearing on October 31, 1983, (the truth of which evidence is not admitted by the Missouri Psychological Association) is irrelevant to the decision of this case on its merits and will not be relied upon by the plaintiffs or by the Missouri Psychological Association in the above action, either in the Circuit Court or upon any appeal. Both the plaintiffs and the Missouri Psychological Association reserve their respective rights to pursue the issue of such additional costs otherwise than in this action.

This agreement binds only the plaintiffs and the Missouri Psychological Association and is not applicable in any manner to any other person or proceeding.

If this letter correctly states our agreement, please sign and return one copy to the writer.

Very truly yours,

/s/ HENRY J. MOHRMAN

HJM:gbs

Agreed to on behalf of the Missouri Psychological Association this 12th day of December, 1983.

MISSOURI PSYCHOLOGICAL ASSOCIATION

/s/ DANIEL P. CARD, II
Its Attorney

APPENDIX D

Section 375.947, Revised Statutes of Missouri, Supplement 1984

375.947.—Notwithstanding the provisions of section 354.015, RSMo, all health services corporations heretofore or hereafter organized under the provisions of chapter 354, RSMo, shall be subject to all duties, obligations, and penalties imposed by sections 375.930 to 375.948. For the purposes of sections 375.930 to 375.948 only, "**business of insurance**" or "**insurance business**" shall include any activity in connection with the establishment and operation of the business of a health services corporation as defined by subdivision (4) of section 354.010, RSMo.